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IN THE

Supreme Court of the United States

October Term, 1967

No. 466

DIESEL TANKER, A. C. DODGE, INC.,

Petitioner,

against

A. B. STEWART, GUY JANSON, K. G. POLAND and G. B. BROOKES, etc.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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The opinion of the United States District Court for the Southern District of New York (R. 4a-10a)* is reported at 262 F. Supp. 6 (1966).

The Memorandum Opinion of the United States Court of Appeals for the Second Circuit (R27a, 28a), which affirmed PER CURIAM on the opinion of the District Court is reported at 376 F.2d 850 (1967).

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* References preceded by the letter "R" are to the record.

Question Presented

Although petitioner litigated this suit through trial and appeal against Underwriters subscribing to two policies of insurance, petitioner does not seek review of that part of the decision dismissing the libel as against the first excess Protection and Indemnity Underwriters. Petitioner seeks review only with respect to that part of the decision which dismissed the libel as against "Legal and/or Contractual Liability" Underwriters. The P. & I. Underwriters have indemnified petitioner for all liabilities incurred by petitioner in litigation arising out of the collision which forms the background of the instant litigation. The question here presented is whether the policy of Legal and/or Contractual Liability Insurance issued by respondent Poland and others covering certain liabilities of petitioner covers a loss sustained by petitioner, not with respect to any liability to others but with respect to the loss of its own property, said loss having been sustained solely by reason of the fact the petitioner did not carry full Hull insurance on its property, i.e., its vessel, but had elected to be a co-insurer with respect to its own property.

Another question presented is whether the Court should concern itself to review a decision of the United States Court of Appeals for the Second Circuit affirming PER CURIAM (rehearing denied) a decree of the District Court in a suit in admiralty involving an issue of coverage on a specialized marine insurance policy, which decision is not in conflict with the decision of any other court involving the same issue and which decision in no way affects the general insuring public.

Statement

The collision which forms the background of this litigation was between the Tanker *A. C. Dodge,* owned by petitioner Diesel Tanker A. C. Dodge, Inc., and the *Michael* occurring on May 25, 1952 as a result of which the *Dodge* was a total loss. Litigation arising out of that collision resulted in a decision that both vessels were at fault, but petitioner, as owner of the *Dodge,* was allowed to limit liability pursuant to 46 U.S.C. 183, et seq. Petition of Diesel Tanker A. C. Dodge, Inc., 133 F. Supp. 510 (E.D.N.Y. 1955), aff'd 234 F. 2d 374 (2d Cir. 1956) cert. denied 352 U.S. 928 (1956).

Thereafter, further proceedings were had on issues as to the amount of the claim of Frances Elliott, Administratrix of the Estate of John Elliott, Master of the *Dodge,* against the *Dodge* and as to the amount of the limitation of liability fund with respect to this death claim. A Commissioner's Report, assessing the value of the Elliott claim, finding that petitioner was liable for such assessed value, less the amount the Estate had received from the *Michael* under a covenant not to sue and finding that the $60.00 per ton aspect of the Limitation Statute was applicable, which resulted in an award against petitioner of $61,500.00, plus interest, was confirmed by the United States District Court for the Eastern District of New York (1959), reported at 173 F. Supp. 906, and affirmed on appeal 282 F. 2d 86 (2d Cir. 1960).

As pointed out by the Second Circuit in the second appeal in the collision litigation, 282 F. 2d 86, at page 88, in a collision where both vessels are at fault, the losses of each vessel are to be added and a decree entered in favor of the vessel suffering the greater loss in an amount equal to one-half the difference in the sums of the losses sustained, unless either vessel is entitled to limitation of liability. As the damages of the *Michael* owner were

greater than the damages of the *Dodge*, the balance was in favor of the *Michael*, but the *Michael* received nothing. The petitioner paid nothing to the *Michael*, because petitioner, by virtue of its right to limitation of liability, was insulated from having to pay the *Michael* one-half of the difference between its loss and the *Michael's* loss. The *Dodge* being a total loss as a result of the collision, there was no limitation fund available with respect to property damage claims against the vessel or petitioner.

The only third party claim which petitioner was called upon to pay as a result of the collision was $64,531.50, inclusive of interest, to the Elliott Estate. (In fact this was the only claim arising out of the collision other than the *Michael* claim that was litigated through trial against petitioner.) In addition, petitioner incurred expenses of a P. & I. nature, including litigation expenses, of $69,929.71, for a total of $134,461.21. It is conceded that the only monies actually expended by petitioner amount to $134,461.21 and that the petitioner has been reimbursed by the Excess Protection and Indemnity Underwriters-respondents and the Primary Protection and Indemnity Underwriters for this amount over the $500.00 deductible average stipulated in the Primary P. & I. Policy. The Primary P. and I. Underwriters paid their policy limits of $25,000.00. The Excess P. and I. Underwriters paid $108,961.21. (See Pretrial Memorandum, R 21a.)

Although the sound value of the *Dodge* was $800,000.00, petitioner elected to obtain and pay for only $400,000.00 of Hull insurance on the vessel, thereby becoming a co-insurer with the Hull Underwriters with respect to the vessel itself. In addition, petitioner had Fire insurance on the vessel in excess of the Hull insurance, on which it collected $75,000.00, as well as the $400,000.00 Hull insurance. The $170,515.94 for which petitioner sued respondents is the balance that the *Dodge* interests, i.e., petitioner and its Property insurers would have recovered from the *Michael* on the Hull claim

had no death, injury or cargo payments been involved. The *Dodge* Hull claim as fixed in the collision litigation was $803,650.57. The *Michael* Hull claim was $462,618.69. If that latter figure had been the full amount of the *Michael's* provable damages, the *Dodge* interests would have collected one-half the difference between the two Hull claims, or $170,515.94, but even if that had been the situation the amount collected from the *Michael* would not have been all for petitioner's account as any such hypothetical recovery from the *Michael* would have been divided equally between petitioner and the Hull insurers. This result would follow from the holding of the Court in *Aetna Insurance* v. *United Fruit*, 304 U.S. 430 (1938).

Reasons for Denying the Writ

There is no federal question involved here; there is no issue of constitutional or statutory construction involved. This case involves no more than a simple dispute between a large shipowning and operating interest and certain liability insurers on a contract of specialized marine insurance where petitioner has had his day in court and is disappointed with the result. There is nothing in the decision below which in any way affects the general public or which in any way affects the legal liability insurance policies carried by homeowners, automobile owners, or other members of the general public, or by commercial enterprises, which types of insurance are subject to state regulation. The petition should also be denied because the decision below is correct; the decision properly reflects well-established principles of admiralty law. There is no conflict between the decision in this suit brought under the admiralty jurisdiction of the Federal Court and the decision of the United States Court of Appeals for the Fifth Circuit in *Simon* v. *Maryland Casualty Company*, 353 F. 2d 608 (1965), a suit at law where the Federal Court jurisdiction was based on diversity.

POINT I

The decision below correctly reflects well-established principles of Admiralty Law.

In presenting its question to the Court of the legal issue on which review is requested, petitioner states that the liability sought to be recovered from respondents is "... the amount of the insured's legal liability to a third party as established in an adversary proceeding. . . ." (Petition p. 2).

The hard fact of the matter is that the total amount of the assured's legal liability to all third parties resulting from the collision as established by all adversary proceedings, was limited to the statutory fund of $60.00 per ton, plus interest or $64,531.50. Petitioner's entire out-of-pocket loss incurred as a result of this collision amounted to $134,461.21 including the statutory fund plus interest above, and legal fees and incidental expenses of $69,929.71. Petitioner has been reimbursed by respondents for its entire out-of-pocket loss excess of the $500.00 deductible average clause. (See Pretrial Memorandum R. p. 21a). By virtue of its right to limitation of liability, the petitioner was insulated from having to pay the *Michael* one-half of the difference between its loss and the *Michael's* loss, although the *Michael* was the creditor vessel after the balance of damage had been struck. *Petition of Diesel Tanker A. C. Dodge, supra.*

The substance of petitioner's argument is that as a result of this collision, petitioner incurred a legal liability to the owner of the *Michael* for one-half of the third party death, personal injury and cargo claims settled by the *Michael* (Petition p. 4).

This is not so. By virtue of limitation of liability, petitioner was insulated from any and all liability resulting from this collision except as to the statutory fund.

It is the established admiralty law of the United States that in a both to blame collision, only a single liability results, i.e., the liability of the owner of the lesser damaged vessel to pay to the owner of the greater damaged vessel, one-half the difference between the two damages. The *North Star,* 106 U.S. 17 (1882). In calculating damages, each vessel is entitled to include all third party death, personal injury and property damage claims resulting from the collision and paid by that vessel in the over-all total of its damages. After calculation of damages, the balance is struck by the owner of the lesser damaged vessel paying one-half the difference between the total damages to the owner of the greater damaged vessel, so that the net result is the equalization of damages resulting from a collision in which both vessels were mutually at fault. *Halcyon* v. *Haenn,* 342 U.S. 282 (1952).

Since only a single liability results in a both to blame collision situation, limitation of liability, if either owner be so entitled, cannot be applied until after the balance is struck. If entitled to benefit of limitation, the owner of the lesser damaged vessel is thereby insulated from all liability except as to the appropriate limitation fund. *North Star, supra.*

This is the established law of the United States and was correctly applied by the Courts in the previous litigation arising out of this collision, i.e., the *Dodge* and the *Michael* were mutually at fault, the *Dodge* was the debtor vessel after the balance was struck, and the *Dodge* by virtue of limitation was insulated from all liability to the *Michael. Petition of Diesel Tanker A. C. Dodge, supra.*

We submit that the Court below correctly applied the established admiralty law of the United States and the established law of the *Dodge/Michael* collision to the facts of this case, i.e., the *Dodge* having been insulated from liability to the *Michael* by virtue of limitation, the peti-

tioner-assured did not incur the requisite legal liability for any claim under the legal liability policies beyond the statutory fund and legal fees already reimbursed to petitioner by respondents. Respondents insured only certain legal liabilities of petitioner to third parties; petitioner was reimbursed by its legal liability Underwriters for such legal liability it incurred.

The Courts below correctly held that petitioner did not incur any legal liability with respect to the setoff against it by the *Michael. New York and Cuba Mail S.S. Company* v. *American S.S. Owners' Mut. Protection and Indemnity Ass'n Inc.*, 72 F. 2d 694 (2d Cir. 1934). The only loss sustained by petitioner here was one it sustained by electing to be a co-insurer with respect to its own property, the diesel tanker *A. C. Dodge.*

POINT II

The decision of the Court below is not in conflict with the decision of the Fifth Circuit in *Simon* vs. *Maryland Casualty Co.*, 353 F. 2d 608 (1965).

Petitioner bases its present claim for review by the Court upon an alleged conflict between the decision of the Court below and the decision of the Fifth Circuit in *Simon* v. *Maryland Casualty Co.*, 353 F. 2d 608 (1965). We submit that the cases are so clearly distinguishable that there is not the slightest conflict.

In *Simon* the plaintiff-assured was a sub-contractor of a prime contractor of the Government. The Government withheld a portion of the contract payment from the prime contractor because of alleged negligence in performance of the contract, some of which was claimed to be chargeable to Simon, the sub-contractor. Simon joined with the prime contractor in a suit against the Government in the Court of Claims to recover the contract price. This

litigation resulted in the finding that employees of Simon had performed negligently and that the Government was entitled to withhold a portion of the contract payment as damages. Maryland Casualty Co., Simon's liability insurer, refused to honor Simon's claim for the withheld payment and the legal fees and costs incurred in the Court of Claims. Maryland Casualty defended on the ground that its only duty was to defend suit *against* Simon and to pay any legal liability of Simon stemming from such suit. It contended that the litigation in the Court of Claims was not a suit against the assured, nor was the decree of the Court of Claims a judgment against the assured within the scope of the "defense" and "no action" clauses of the liability policy. In *Simon's* suit for declaratory judgment against Maryland Casualty, the District Court held there was no coverage, but the Fifth Circuit reversed this decision.

Judge Brown succinctly delineated the sole issue of the *Simon* case in the opening paragraph of the Fifth Circuit's opinion at page 610:

> "The question in this case is whether the defense coverage provisions and no action clause of a general liability policy are to be read so literally that an assured, who, in an adversary proceeding has been adjudicated guilty of negligence by a constitutional court, is denied any coverage because the suit was by, not against, him and no affirmative monetary judgment was rendered against him. The District Court in this declaratory judgment action held no coverage. We disagree and reverse."

It is obvious that the Fifth Circuit considered the sole question in the case to be whether Simon had been adjudicated legally liable in an adversary proceeding and, having answered this question in the affirmative, it concluded there was coverage under the policy.

Here there was no legal liability on the part of petitioner for property damages because it was entitled under

the limitation of liability statute to limit its liability to nothing with respect to property damage claims. Under the findings in the collision litigation its liability for personal injury and death claims could not have exceeded the statutory $60.00 per ton fund and petitioner has been reimbursed to the extent of its liability for such claims.

Another clear distinction between the two cases is that it is obvious in the *Simon* case, that the Government, had it not withheld the amounts due under the contract, could have sued Simon direct as a tort-feasor and would have recovered a judgment based on Simon's legal liability. Here, had the death and injury claimants all proceeded against the petitioner in the collision litigation which, with the exception of the Estate of Elliott, they did not, the sum total of the recoveries on all such death and injury claims could not have exceeded the statutory limitation fund.

There is another clear distinction between the two cases. The instant case involves a suit in Admiralty founded on contracts of marine insurance and brought under the Admiralty jurisdiction of the Federal Court, 28 U.S.C. 1333 (District Court opinion R 4a). *Simon* v. *Maryland* was a civil suit brought in the District Court for the Western District of Texas. There jurisdiction was based on diversity. There the controlling law was the state law. *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1938). *Simon* did not involve any question of admiralty or maritime law.

It is appropriate to point out that while petitioner relied on the *Simon* case as authority for its contention in the District Court, petitioner made no reference to *Simon* as an authority in its briefs or argument in the Circuit Court of Appeals, except as a support for its petition for rehearing filed in the Court of Appeals after the PER CURIAM affirmance.

Conclusion

This case has not required the formulation of any new principles or doctrines. It has been decided in accordance with long established principles of admiralty and maritime law. Under its facts there has been no error below and there are no issues of broad scope and general interest. There is no conflict between the decision of the Court below and the decisions of other Courts of Appeal. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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